STATE OF MICHIGAN

COURT OF APPEALS

JOHN R. SOBRAN and CAROLE S. SOBRAN,

Plaintiffs-Appellants,

and

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

ALASDAIR MCKENDRICK, M.D.,

Defendant-Appellee.

UNPUBLISHED
April 11, 1997

No. 185581
Oakland Circuit Court
LC No. 93-467068-NH

Before: Jansen, P.J., and Saad and M.D. Schwartz,* JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right from the trial court's April 14, 1996, order dismissing their action with prejudice. We affirm.

Plaintiffs allege that defendant, a colorectal surgeon who performed corrective surgery on plaintiff John Sobran's ileostomy, was negligent in not properly diagnosing the cause of plaintiff's pain because of his failure to perform a sigmoidoscopy. Plaintiffs argue on appeal that the trial court abused its discretion in excluding the testimony of their expert witness. The trial court struck plaintiff's expert witness because the expert, Dr. Caminker, did not articulate the standard of practice regarding colorectal surgeons.

The essential elements that a plaintiff in a medical malpractice claim must establish are: "(1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4)

* Circuit judge, sitting on the Court of Appeals by assignment.

proximate causation between the alleged breach and the injury. MCL 600.2912a; MSA 27A.2912(1). To survive a motion for directed verdict, the plaintiff must make a prima facie showing regarding each of the above elements." *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). In order to establish the first element, "[a] party offering the testimony of an expert witness must demonstrate the witness' knowledge of the applicable standard of care." *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 141; 528 NW2d 170 (1995). A trial court's decision finding an expert witness to be qualified is reviewed for an abuse of discretion. *Id.*

During the time this lawsuit was ongoing, the qualification of expert witnesses to testify about the standard of care for specialists in medical malpractice lawsuits was governed by MCL 600.2169(1); MSA 27A.2169(1). When this lawsuit was filed on December 8, 1993, the statute read in pertinent part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

We acknowledge that this Court has recently determined that that MCL 600.2169(1); MSA 27A.2169(1) violates the Separation of Powers Clause, Const, 1963, art 6, § 5.[1] *McDougall v Eliuk*, 218 Mich App 501; 554 NW2d 56 (1996). However, although the trial court ruled that the expert witness was not qualified to testify pursuant to MCL 600.2169(1); MSA 27A.2169(1), we find no abuse of discretion on the part of the trial court because it is clear from the lower court record that the expert was not qualified under MRE 702 as well.

Under MRE 702, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise. The defendant, Dr. McKendrick, is board certified in general surgery and colorectal surgery. Plaintiff's expert witness, Dr. Caminker, is not board certified in general surgery or colorectal surgery, but he is board certified in gastroenterology and internal medicine. Dr. Caminker's specialty is gastroenterology. Dr. Caminker's deposition testimony acknowledged that his opinion was based on the prospective of a gastroenterologist, that he had never performed a revision of an ileostomy dysfunction, and that he did not know the training required of a colorectal surgeon. He professed no expertise in surgery in general or colorectal surgery in particular. In fact, Dr. Caminker specifically testified that he is not an expert in the surgical aspect of colon and rectal surgery. Although Dr. Caminker testified that he was familiar with the standard of practice for endoscopic procedures, at no point did he testify that he was familiar with the applicable standard of care for colorectal surgeons. Moreover, the witness admitted that he did not review defendant's medical records on plaintiff until a few minutes before the scheduled deposition.

Under these circumstances, we conclude that the trial court did not abuse its discretion in striking plaintiff's expert witness because the expert witness was not qualified as an expert under MRE 702. The expert witness did not establish an adequate basis that he was familiar with the appropriate standard of care. See *Dybata v Kistler,* 140 Mich App 65, 70; 362 NW2d 891 (1985).

Affirmed.

/s/ Kathleen Jansen
/s/ Henry W. Saad
/s/ Michael D. Schwartz

[1] Plaintiffs also argue that MCL 600.2169(1); MSA 27A.2169(1) violates the due process clause of the federal and state constitutions. However, this issue was not raised below and not decided by the trial court. Further, because this claim is not dispositive of the appeal, as plaintiff's expert was not qualified to testify under MRE 702, we will not address this issue. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993).